Finally, Perez points to only one instance in which a court of appeals has itself suggested that the "nearly identical" articulation of the Title VII standard conflicts with the any other articulation of the standard, but that case concerns only an alleged conflict *within* the Eleventh Circuit. *Anderson v. WBMG-42*, 253 F.3d 561, 565 (CA11 2001) (citing *Alexander v. Fulton County*, 207 F.3d 1303, 1334 (CA11 2000)). Intra-circuit conflict is not grounds for granting review. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Regardless, a more recent Eleventh Circuit decision suggests that the *Anderson* court—like Perez—identified a mere difference in description, not substance. *Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ.*, 342 F.3d 1281, 1289-1290 (CA11 2003) (explaining that "[r]egardless of whether th[e] analysis requires 'similar' misconduct . . . or the *seemingly* more stringent 'nearly identical' misconduct," the standard was not met where the comparator was similarly situated to the plaintiff in some, but not all, relevant respects (emphasis added) (citations omitted)).

In sum, Perez has failed to show anything more than differing language among the circuits about how to describe the Title VII standard at issue here. The underlying standard is, in substance, the same in the Fifth, Sixth, and D.C. Circuits as it is in the circuits mentioned in Perez's petition as well as in all others that have addressed the issue. *See Brummett v. Sinclair Broad. Group, Inc.*, 414 F.3d 686, 692 (CA7 2005) (proper comparators are employees "'directly comparable to [the plaintiff] in all material respects'") (citation omitted); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (CA1 1999) (plaintiff and comparator must closely resemble one another in respect to relevant facts and circumstances); *supra* Part I.A-B (addressing the decisions that Perez cites from the Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits); *see also Patches v. City of Phoenix*, 68 Fed. Appx. 772, 774 (CA9 2003) (citing decisions from the Second and Eighth

Circuits regarding the relevant Title VII comparator standard); *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 672 (CA Fed. 2000) (affirming summary judgment on a 42 U.S.C. §1981 claim based on the Eighth Circuit's "similarly situated" standard as applied in a Title VII case).

II. In Light of the Relevant Facts, the Court of Appeals's Decision Comports with This Court's Precedent.

The district court's jury instructions must be read in the context of this case. *See McDonnell Douglas*, 411 U.S., at 802 n.13 (noting that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof required from [the *McDonnell Douglas* plaintiff] is not necessarily applicable in every respect to differing factual situations"). Although Perez rejects the court of appeals's basis for distinguishing *McDonald* and *McDonnell Douglas*, Pet. 10, he fails to acknowledge a significant factual difference between both of those cases and the present one.

In *McDonnell Douglas*, the plaintiff's misconduct—physically blocking access to the manufacturing plant where he had worked—was directed against his employer. 411 U.S., at 794; *see also McDonald*, 427 U.S., at 283 n.11 (noting that proper Title VII comparators are "other 'employees involved in acts against (the employer) of comparable seriousness'") (quoting *McDonnell Douglas*, 411 U.S., at 804). Similarly, two relevant aspects of Perez's misconduct in this case were his act of violence against a former TDCJ inmate, as opposed to a third-party with no connection to TDCJ, and his refusal to cooperate with TDCJ's investigation of the assault. Pet. App. 12a-14a. By contrast, the misconduct of each of Perez's comparators was against a third party with no connection to the prison, and, unlike Perez, neither comparator resisted TDCJ's investigation of his questioned conduct. Pet. App. 12a-14a.

In focusing on the alleged similarity between the violent act that Perez committed and those that his comparators committed, Perez's argument effectively seeks alteration of the Title VII standard to require similarity with regard to only *one* relevant aspect of the plaintiff's and the comparators' circumstances. He would like "all relevant aspects" in the applicable Title VII analysis—the standard applied by all the circuits—to be viewed narrowly, from the perspective of individual victims. But the law is not so limited.

As already noted, a relevant part of Perez's misconduct was directed at TDCJ itself. Pet. App. 2a-3a, 14a (noting that Perez both refused to discuss the incident leading to his arrest with his supervisor and violated agency policy by refusing to cooperate with TDCJ's investigation of the incident). The court of appeals thus correctly determined that the district court's instructions to the jury were impermissibly incomplete. Pet. App. 10a, 14a-15a. This legal conclusion comports with the *McDonnell Douglas* Court's recognition that the requirements to show discrimination under Title VII will vary with the facts of each case, 411 U.S., at 802 n.13, and it also aligns with all the courts of appeals' recognition that a proper comparator must be similarly situated to the plaintiff in all relevant respects. *See supra* Part I. As the court of appeals concluded, the district court's charge in this case allowed the jury to find discrimination without considering potentially significant differences, from TDCJ's perspective, in the relevant aspects of Perez's and his comparators' circumstances.

Perez asserts that the court of appeals's opinion imposes a virtually insurmountable burden on plaintiffs attempting to identify comparators. Pet. 11. But this assertion depends on the erroneous conclusion that the "nearly identical" standard differs substantively from the standard that other circuits describe with the words "similarly situated," *see supra* Part I, and it ignores the

uncontroversial requirement that Title VII comparators must be situated similarly to the plaintiff in all relevant respects.[1]

In short, the alleged error that Perez identifies in the court of appeals's opinion is nothing more than the factbound application of settled law. Because the district court's instructions risked allowing the jury to accept Perez's comparators as "similarly situated" without considering the relevant question of whether they were similarly situated in all relevant respects—that is, in all respects that would have had a bearing on TDCJ's decision about what level of discipline was required in each of their circumstances—the court of appeals's decision comports with *McDonald* and *McDonnell Douglas*. Perez has therefore failed to show that the court of appeals's decision conflicts either with case law from other circuits, *see supra* Part I, or with decisions from this Court.

III. THE COURT HAS RECENTLY DECLINED TO REVIEW THE PRECISE QUESTION THAT PEREZ PRESENTS.

Last Term, the Court declined to consider the same question that Perez presents. *Burton v. Buckner Children & Family Servs., Inc.*, 104 Fed. Appx. 394 (CA5 2004), *cert. denied*, 125 S.Ct. 871 (2005) (Question Presented: "When comparator evidence is used as a form of circumstantial evidence to establish discrimination, must the comparable employee be involved in nearly identical circumstances in order for the evidence to be received and

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[1] Furthermore, contrary to Perez's argument, Pet. 11 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)), this is not a case in which the evidence supporting Perez's *prima facie* case also determined the issue of discrimination *vel non*. The court of appeals correctly concluded that a properly instructed jury could have found that factual distinctions between Perez's circumstances and his comparators' precluded a finding of discrimination. Pet. App. 14a-15a.

considered?"). The *Burton* petition made essentially the same argument that Perez makes in his petition, *see* 2004 WL 2326798, at *23, and the Court's denial of review in *Burton* was consistent with the Court's repeated denial of review in other similar cases.[2]

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[2] *See Murphy v. Univ. of Cincinnati*, 72 Fed. Appx. 288 (CA6 2003), *cert. denied*, 124 S. Ct. 2159 (2004) (Question Presented: "To qualify as a 'similarly situated' employee . . . in a discrimination case, must the [plaintiff's and the comparator's] positions be identical such that any variation no matter how immaterial can defeat a claim, as held by the Sixth Circuit in this case and by the Fourth and Eleventh Circuits in other decisions, or are . . . the First, Seventh, Eighth and Tenth Circuits correct in their holdings that the 'similarly situated' requirement should not be so strictly applied 'as to prevent individuals with unique jobs from ever establishing a prima facie case'?") (quoting *Murphy*, 72 Fed. Appx., at 300 (Clay, J., dissenting)); *Ratley v. City of Jacksonville*, 37 Fed. Appx. 507 (CA11 2002), *cert. denied*, 537 U.S. 885 (2002) (Question Presented: "Whether the Eleventh Circuit erred by not finding an abuse of discretion by the lower court for requiring nearly identical conduct instead of comparably serious conduct to identify Title VII comparators for purposes of establishing Petitioner's prima facie case of sex discrimination."); *Lambert v. Fulton County*, 253 F.3d 588 (CA11 2001), *cert. denied*, 122 S. Ct. 2361 (2002) (Question Presented: "Whether certiorari should be granted to resolve a conflict among the United States Courts of Appeal[s] as to the standard for proper comparators in a disparate discipline employment discrimination case?"); *Ellerbe v. Mineta*, 2 Fed. Appx. 6 (CADC 2001), *cert. denied*, 534 U.S. 895 (2001) (Question Presented: "Whether the lower courts erred in excluding relevant evidence by applying the District of Columbia Circuit's comparator standard which is more restrictive than that of other circuits?"); *Harvis v. Roadway Express, Inc.*, 111 F.3d 131 (CA6 1997), *cert. denied*, 522 U.S. 860 (1997) (Question Presented: "Where a black plaintiff alleges that he was dismissed discriminatorily . . ., is he required, in order to establish a prima facie case, or demonstrate the pretextuality of his employer's proffered justifications, to identify a non-dismissed

Nothing has changed; this case is similarly unworthy of the Court's review.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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white employee whose position, situation, and work history were 'nearly identical' to his own?").

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No. 04-1543

IN THE

Supreme Court of the United States

JAVIER PEREZ,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I

The State attempts to diminish the Circuit Court split in Title VII cases by arguing that "similarly situated" and "nearly identical" really mean the same thing. If these two terms meant the same thing, it could not have been error for the district court to utilize the "similarly situated" instruction. But the Fifth Circuit did find error, holding that more was required; namely that the circumstances be "nearly identical," thus disagreeing with five of its Sister Circuits.

The fact is that an ongoing circuit split exists, and the split is over substance, not form. Since the State concedes that no vehicle problems exist, this case presents this important issue head-on, and this Court should resolve it now.

The argument that the Fifth Circuit merely uses different language to describe the same standard is undermined by the fact that the State made the opposite argument to the Fifth Circuit. It convinced the appellate court that Perez had do *more* than just prove that similarly situated Anglos were treated more leniently. The State convinced the appellate court that Perez may have lost had he been required to show that he was discharged under "nearly identical" circumstances, even though he won under the "similarly situated" instruction.[1]

The State fails to even *discuss* the actual instruction submitted to the jury. Perez was required to prove "that one or more similarly situated non-Hispanics who engaged in criminal activity were treated more favorably." This whole case was tried on the State's attempts to explain its position that these Anglos were not "similarly situated." The jury

---

1. The State was probably right, since the Anglos' circumstances were arguably *worse* in that deaths and dishonesty were involved.

found disparate discipline among similarly situated prison guards, and the Fifth Circuit, like the Sixth and D.C. circuits, held that this was not enough; that more was required.

This conflict needs to be resolved because litigants in Title VII cases should not have their rights adjudicated based upon the fortuitousness of the circuit in which they find themselves. What could be more arbitrary than for Title VII plaintiffs to win or lose based on where they happen to live?

The changing of the burden of proof from "similarly situated" to "nearly identical" has real world implications, as evidenced by the result in this very case. Given this usurpation of Title VII, this Court should grant the petition, resolve the split and clear up this critical attack on Title VII.

REASONS FOR GRANTING THE PETITION

I. The Circuit Court Split is Real.

A. The State's Attempt to Diminish Important Distinctions In Legal Standards by Labeling them "Shorthand" is Unpersuasive.

In an attempt to gloss over the split, the State states that "different circuits label the Title VII standard differently." These different "labels" are in reality matters of substance, not form. The circuit courts which have resisted the invitation to change the burden of proof have explained in pointed terms how this different standard would render Title VII inoperative. If the "nearly identical" test were applied, then when a Hispanic commits misconduct *less serious* than an Anglo's misconduct and the Hispanic is fired while the Anglo is retained, the employer would escape liability because the

circumstances were not "nearly identical." Or, if an employee is in a unique employment position, the employer again would escape liability for race discrimination because there could be no comparator at all.

The reality is that the Circuits Courts are split in this regard, with the Fifth, Sixth and D.C. Circuits condoning this approach while the district court followed this Court's precedent and applied the correct standard. This issue is no mere "quibble". It is a conflict, pure and simple, on a critical Title VII issue.

B. The State's Argument that Most Circuits Go its Way Does Not Diminish the Circuit Split but Instead Establishes it.

The State argues that most circuits have done like the Fifth Circuit has done, and changed the burden of proof in Title VII cases. Although this argument is not supported in the Brief, it serves to demonstrate the real world split that is upsetting the Title VII world. Either "similarly situated" is the right standard, or it is not.

The State makes an unsupported declaration that the jury charge in this case "allowed the jury to ignore differences between Perez and the [Anglo] comparators." Instead, the district court's charge did just the opposite, inquiring whether the individuals were "similarly situated." Imposing a higher standard would, as this Court recognized in a *Batson* claim in *Miller-El v. Dretke,* 545 U.S. __, 125 S. Ct. 2317 (2005), render the statute "inoperable." *Id.* at 2329 n.6. The Second, Third, Fourth, Eighth and Tenth Circuits recognize this, but the Fifth, Sixth and D.C. Circuits do not.

II. The Relevant Facts Reveal the Need to Clear Up the Split.

The ultimate question for the jury was whether similarly situated Anglos who had committed misconduct were treated more leniently. The State argued hard to the jury that the Anglos were *not* similarly situated. It starts with the argument that, because Perez got into a fight with an ex-inmate, he was not similarly situated to his comparators. Unlike the jury, the State ignores the evidence that the warden who fired Perez admitted that this made no difference. *(4 R. 183-84)* Likewise, the State argues that Perez "resisted" TDCJ's investigation, while the evidence was that the warden admitted that the Anglo comparators had resisted telling the whole truth and had omitted material facts. *(4 R. 62-63, 5 R. 157-58)*

The Anglo prison guards were obviously similarly situated. One of them got drunk, got behind the wheel and killed a member of the public, then concealed his rate of speed to the State. *See Perez v. Tex. Dept. Criminal Justice,* 395 F.3d 206, 213-14 (5th Cir. 2004)(5 R 62-63) After being charged with felony intoxication manslaughter, he was *promoted. (4 R 159-60)* Then he plea-bargained the charges so that he was convicted of a lesser crime, but was never fired or even subjected to an IAD investigation like the one that led to Perez's termination. Instead, he served jail time on weekends before returning to his prison job of guarding other criminals. *(4 R 170-71)*

The other two Anglo comparators who, like Perez and Clover, were prison guards, got drunk and beat a man into submission so that he would give them money. *(4 R 144,150-51)* They broke his ribs, punctured his lungs and sent him to the hospital. When they were charged with felony assault,

they concealed to the warden that they had been drinking. *(4 R 157-58)* They plea-bargained the charges down. They did not suffer an IAD investigation like Perez and were not fired like Perez. Yet their circumstances, while arguably *worse* than Perez', were apparently not "nearly identical".

III. The State's Protests that This Court Has Received Numerous Petitions for Certiorari Only Underscores the Need to Resolve the Circuit Split.

The State is certainly right that this Court is being inundated with cases springing from the creation of evidentiary hurdles Congress never intended. This is a reason for this issue to be cleared up, not ignored. This Court is under no obligation to simply allow this to continue to fester.

Tellingly, this Court recently confronted an argument which is nearly identical to the one Respondent makes here. In *Miller-El v. Dretke*, the prosecutor had used peremptory strikes to exclude African American potential jurors while retaining Anglos. The prosecutor argued that apparently racially motivated jury strikes of African Americans were not discriminatory because the situations of the Anglos selected were not identical to that of the African Americans excluded by the prosecution. This Court, in plain terms, rejected this artifice:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these

> purported reasons were pretextual. A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters".

125 S. Ct. at 2329 n. 6

A "nearly identical" legal standard would just as clearly render Title VII inoperable. This device of ratcheting up the burden of proof in race cases has grave implications to the statute's remedial purposes. So long as the discrimination is cloaked with the claim that there are no "nearly identical" comparators, the bar is set so high that it can never be cleared. Some circuit courts have recognized the fallacy of taking of liberties with the standard, while others, like the Fifth Circuit in this case, have done the opposite. For Title VII to have the vitality Congress intended, the standard must be workable.

This strangulation of the term "similarly situated" into "nearly identical" is now having real world consequences, even to the point of courts *rendering* jury verdicts finding race discrimination. *See Bryant v. Compass Group USA, Inc.*, 413 F.3d 471 (5th Cir. 2005). The district court in that case utilized the "similarly situated" standard. The Fifth Circuit held that being similarly situated did not even create a *fact question* and therefore rendered judgment for the defendant, holding that the circumstances were not "nearly identical."

CONCLUSION

This issue should be resolved. The standard of proving race discrimination under Title VII should be uniform throughout the land, and the standard should not be one that renders the statute "inoperable." The petition should promptly be granted and the case set for argument.

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